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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35873[1]

NORFOLK SOUTHERN RAILWAY COMPANY—ACQUISITION AND OPERATION—CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY COMPANY, INC.

Digest:[2] This decision denies three petitions for reconsideration and addresses several motions and other pleadings related to the Board's Decision No. 6 in this proceeding.

Decision No. 10

Decided: October 13, 2016

BACKGROUND

On November 17, 2014, Norfolk Southern Railway Company (NSR or Applicant), a Class I railroad, filed an application seeking approval under 49 U.S.C. §§ 11323-25 of NSR's acquisition and operation of 282.55 miles of rail line (the D&H South Lines or the Lines) owned by Delaware and Hudson Railway Company, Inc. (D&H). With that application, NSR also filed two notices of exemption to modify existing trackage rights agreements between NSR and D&H. The Surface Transportation Board (Board) found the transaction to be in the public interest and granted NSR's application, subject to certain conditions, in a decision served May 15, 2015. Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (Decision No. 6), FD 35873 (STB served May 15, 2015). Decision No. 6 became effective on June 14, 2015, and on September 18, 2015, NSR notified the Board that it had consummated the transaction.

On May 15, 2015, the same day the Board's decision granting NSR's application was served, James Riffin (Riffin) filed a supplement to a motion to stay he had filed on May 14,

[1] This decision also embraces Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34209 (Sub-No. 1), and Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34562 (Sub-No. 1).

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

2015, which the Board denied in Decision No. 6.[3] Also on May 15, 2015, Eric Strohmeyer (Strohmeyer) filed a petition to intervene and reply to Riffin's May 14 motion to stay.[4]

On June 4, 2015, the Board received petitions for reconsideration of Decision No. 6 from PPL EnergyPlus, LLC (PPL), Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY or Nasca), and CNJ Rail Corporation (CNJ). SMART/TD-NY's petition for reconsideration also contained a petition for stay requesting that the Board stay the effectiveness of Decision No. 6 pending the disposition of the petitions for reconsideration. The Board denied SMART/TD-NY's request for a stay in Norfolk Southern Railway— Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Railway (Decision No. 7), FD 35873 (STB served June 12, 2015). On June 24, 2015, Riffin filed support for SMART/TD-NY's denied request for a stay. On June 24, 2015, Riffin also filed a pleading styled as a reply to the three petitions for reconsideration, supporting reconsideration of Decision No. 6 and Decision No. 7, and arguing that the Board should stay Decision No. 6 pending judicial review. On June 24, 2015, NSR and D&H each filed replies opposing the petitions for reconsideration. On June 29, 2015, NSR filed a reply to Riffin's June 24 filing, requesting it be rejected as untimely. On July 6, 2015, SMART/TD-NY filed a motion to strike portions of NSR's reply to its petition for reconsideration. On July 24, 2015, NSR replied to SMART/TD-NY's motion, requesting that it either be stricken from the record as an unlawful reply or denied.

On August 14, 2015, CNJ filed in this proceeding a copy of its notice of intent to participate and its comments in R.J. Corman Railroad—Abandonment Exemption—in Lehigh County, Pa., Docket No. AB 550 (Sub-No 3X). On September 4, 2015, Riffin filed a motion to supplement the record here with a copy of the record in Canadian Pacific Ltd.—Purchase & Related Trackage Rights—Delaware & Hudson Railway, Docket No. FD 31700. Also on September 4, 2015, Riffin filed a motion to supplement the record here with a copy of a petition to revoke filed in Delaware & Hudson Railway—Discontinuance of Trackage Rights—in Broome County, N.Y.; Essex, Union, Somerset, Hunterdon, & Warren Counties., N.J.; Luzerne, Perry, York, Lancaster, Northampton, Lehigh, Carbon, Berks, Montgomery, Northumberland, Dauphin, Lebanon, & Philadelphia Counties., Pa.; Harford, Baltimore, Anne Arundel, & Prince George's Counties., Md.; District of Columbia; & Arlington County, Va. (D&H Discontinuances), Docket No. AB 156 (Sub-No. 27X) by SMART/TD-NY on August 28, 2015.[5] On September 14, 2015, NSR filed a response to Riffin's three September 4 filings requesting that they be rejected.

[3] Riffin's May 15, 2015 filing is accepted into the record, but the Board will not address it further because it ruled on Riffin's motion in Decision No. 6. See Decision No. 6 at 12-13.

[4] Strohmeyer's petition to intervene will be granted and his May 15, 2015 pleadings will be accepted into the record.

[5] In a decision served on October 18, 2016, the Board denied SMART/TD-NY's petition to revoke in that proceeding.

The American Train Dispatchers Association (ATDA) filed a petition dated September 10, 2015, seeking an order that would prevent consummation of this line sale transaction until implementing agreements under the labor conditions imposed in Decision No. 6 were reached. The Board denied ATDA's request in a decision served on September 18, 2015. See Norfolk Southern Railway—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Railway (Decision No. 8), FD 35873 (STB served Sept. 18, 2015). On October 5, 2015, Riffin filed a supplement to the record here commenting on ATDA's filing and the Board's jurisdiction to issue Decision No. 8, and asking that ATDA's filing be considered "new evidence" when the Board considered the petitions for reconsideration of Decision No. 6. On October 5, 2015, Riffin also filed an amended certificate of service to his supplement. On October 14, 2015, NSR replied to Riffin's October 5 filing, arguing it should be stricken under 49 C.F.R. § 1104.8 as redundant, irrelevant, and immaterial.

On December 21, 2015, Riffin filed a motion to supplement the record and comments discussing what he describes as "new evidence" that amounts to "substantially changed circumstances" in this proceeding. In a decision served March 24, 2016, the Board struck these pleadings under 49 C.F.R. § 1104.8 as irrelevant and immaterial and directed Riffin to refrain from making inappropriate filings before the Board in the future.

PRELIMINARY MATTERS

Riffin's June 24, 2015, Reply to SMART/TD-NY's Petition for Stay. On June 24, 2015, Riffin replied to SMART/TD-NY's June 4, 2015 petition for stay and Decision No. 7 denying that stay. Riffin argues that his due process rights were violated because the Board issued Decision No. 7 before the end of the 20-day time period for replies in 49 C.F.R. § 1104.13(a). NSR replied to Riffin's comments, arguing that Riffin's reply should be rejected as untimely because replies to SMART/TD-NY's petition for stay were due either six days (if filed under 49 C.F.R. § 1115.3(f)) or five days (if filed under 49 C.F.R. § 1115.5(a)) after the petition was filed, and Riffin's comments were filed 20 days after the petition.

Riffin's reply will be rejected. Under 49 C.F.R. § 1115.3(f), the deadline to reply to SMART/TD-NY's petition for stay was six days after the petition was filed. Riffin did not file his reply until June 24, 2015, 20 days after SMART/TD-NY's petition was filed. Decision No. 7 was issued on June 12, 2015, after the applicable deadline for replies. Riffin therefore has not shown that his due process rights were violated.

Riffin's June 24, 2015 Reply to the Petitions for Reconsideration. On June 24, 2015, Riffin also filed a pleading he captioned as a reply to the three petitions for reconsideration. Riffin supports the petitions for reconsideration of Decision No. 6 and Decision No. 7 (denying

SMART/TD-NY's request for a stay of Decision No. 6) in this particular June 24 reply.[6] If Riffin seeks his own reconsideration of Decision No. 6 by this pleading, petitions for reconsideration were due by June 4, 2015 and he has made no request that the Board accept a late-filed petition. In any event, Riffin has failed to demonstrate that there is new evidence, changed circumstances, or material error warranting reconsideration of Decision No. 6 or Decision No. 7 in his pleading.[7] Riffin's pleading is denied to the extent it was meant to serve as a petition for reconsideration.

SMART/TD-NY's July 6, 2015 Motion to Strike. On July 6, 2015, SMART-TD/NY filed a motion to strike portions of NSR's June 24, 2015 reply addressing SMART/TD-NY's petition for reconsideration of Decision No. 6. SMART/TD-NY alleges that NSR improperly questions SMART/TD-NY's standing and takes issue with NSR's characterization of the employee protection conditions set out in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C. 60, aff'd New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc. (Wilmington Terminal), 6 I.C.C.2d 799, 814-26 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991) as

[6] Riffin also sought judicial review of Decision No. 6. See Riffin v. STB, No. 16-1043 (D.C. Cir. filed Feb. 4, 2016). On February 4, 2016, Riffin's petition, originally filed in the Third Circuit (Riffin v. STB, No. 15-2701 (3d Cir. filed July 15, 2015)), was transferred to the D.C. Circuit. That court proceeding is being held in abeyance pending disposition of the pending petitions for reconsideration.

[7] A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3; see also Decision No. 6 at 5. Riffin's arguments regarding the consequences of the consummation of this transaction prior to consummation of the transaction in D&H Discontinuances are moot because both transactions have been consummated, are not appropriately raised in this proceeding, and are addressed in the Board's October 18, 2016 decision in the D&H Discontinuances docket. The Board rejects Riffin's arguments that NSR's application lacked the operational data required under 49 C.F.R. § 1180.8(c), as NSR did include adequate information in its application to comply with the requirements of 49 C.F.R. § 1180.8(c). (See NSR Appl. Vol. I at 58-61.) As the Board has repeatedly rejected the argument that D&H Discontinuances should have been embraced into this proceeding, NSR's lack of inclusion of additional information related to those discontinuances is not a deficiency in its application. Riffin also argues that Decision No. 7, denying SMART/TD-NY's petition to stay Decision No. 6, should be vacated and that the stay should be granted "based on the very high probability that Norfolk Southern's Application will be rejected, due to being 'incomplete.'" (Riffin Reply to Pets. for Recons. 5.) However, Riffin does not support this argument with any evidence, and the denial of the petitions for reconsideration discussed below makes his argument moot.

"long standing precedent." On July 24, 2015, NSR replied, requesting that the motion either be stricken from the record as an unlawful reply to NSR's reply or denied.

SMART/TD-NY has not presented any grounds for striking any portion of NSR's reply to SMART/TD-NY's petition for reconsideration. That NSR disagrees with SMART/TD-NY's position is not a basis to strike NSR's reply. Nor has SMART/TD-NY presented evidence that the statements in NSR's reply are scandalous, impertinent, immaterial, or otherwise objectionable and therefore eligible to be stricken under 49 C.F.R. § 1104.8. Accordingly, SMART/TD-NY's motion to strike is denied, and NSR's motion for SMART/TD-NY's motion to be stricken is denied as moot.

CNJ's August 14, 2015, Filing. On August 14, 2015, CNJ filed a copy of its notice of intent to participate and its comments in R.J. Corman Railroad, Docket No. AB 550 (Sub-No. 3X). CNJ's pleading was rejected in that proceeding in a decision issued on August 20, 2015. CNJ also did not present any argument or explanation as to why this filing is relevant to this proceeding or why a copy of this filing is necessary in this docket. CNJ's filing will be rejected under 49 C.F.R. § 1104.8 because CNJ fails to show why its filing in another proceeding is relevant or material to the issues before the Board here.

Riffin's First September 4, 2015, Motion to Supplement. On September 4, 2015, Riffin filed a motion to supplement the record with what he states is "a copy of the file" from Canadian Pacific Ltd.—Purchase & Related Trackage Rights—Delaware & Hudson Railway, Docket No. FD 31700, as well as an amended service list for that motion. On September 14, 2015, NSR filed a reply requesting that Riffin's motion be rejected or treated as improper rebuttal, and arguing that the record had closed on June 24, 2015. Riffin's motion to supplement will be denied under 49 C.F.R. § 1104.8. The Board is aware of Docket No. FD 31700, and the filings in that case are all in the public record. Riffin has not shown that it would be relevant or necessary to include over 150 pages of filings from that proceeding in the record here.

Riffin's Second September 4, 2015, Motion to Supplement. On September 4, 2015, Riffin filed a motion to supplement the record with a copy of SMART/TD-NY's August 28, 2015 petition to revoke the exemption in D&H Discontinuances, Docket No. AB 156 (Sub-No. 27X).[8] Riffin argues that NSR's application here is "potentially fatally defective" for reasons related to the discontinuance of trackage rights in D&H Discontinuances. (Riffin Second Sept. 4 Motion to Suppl. at 1.) Riffin claims that SMART/TD-NY's petition to revoke in the D&H Discontinuances proceeding should be placed in the record here "to let the STB, and the world, know what [SMART/TD-NY] has argued, so that the world may judge for itself, the likelihood that the D&H's [e]xemption will be revoked, or vacated on judicial review." (Riffin Second Sept. 4 Motion to Suppl. at 4.) On September 14, 2015, NSR requested that Riffin's motion be rejected or treated as improper rebuttal.

[8] See n.5.

Riffin's motion to supplement will be denied under 49 C.F.R. § 1104.8. Riffin has failed to establish that the SMART/TD NY petition to revoke is relevant or material to this proceeding.

Riffin's October 5, 2015, Supplement to the Record. On October 5, 2015, Riffin filed a supplement to the record and an amended certificate of service commenting on ATDA's filing in this proceeding dated September 10, 2015. Riffin argues that ATDA's filing is new evidence relevant in the Board's consideration of the three petitions for reconsideration.[9] Riffin also argues that the Board did not have jurisdiction to issue Decision No. 8 because of his judicial appeal of Decision No. 6, and that the Board violated his due process rights by issuing that decision before the end of the 20-day time period for replies to ATDA's filing under 49 C.F.R. § 1104.13(a). NSR replied to Riffin's supplement on October 14, 2015, arguing that the Board should strike or reject Riffin's filing as redundant, irrelevant, and immaterial under 49 C.F.R. § 1104.8.

Riffin's argument that the Board did not have jurisdiction to issue Decision No. 8 because he had appealed Decision No. 6 lacks merit. The D.C. Circuit has held its review of Decision No. 6 in abeyance pending the agency's disposition of the petitions for reconsideration addressed in this decision, and as such, there was no prejudice to Riffin by the issuance of Decision No. 8 while the appeal has been pending. See Riffin v. STB, No. 16-1043 (D.C. Cir. Apr. 6, 2016) (holding case in abeyance). In addition, Riffin was not deprived of due process when the Board issued Decision No. 8. The Board's regulations at 49 C.F.R. § 1104.13(a) provide parties with 20 days in which to reply to pleadings filed with the Board, but do not require the Board to wait 20 days before issuing a decision on a pleading. While it is Board practice to provide interested parties with the entire 20-day time period when possible, in this instance, ATDA and NSR both advised the Board that the transaction approved in Decision No. 6 (which had become effective on June 14, 2015) was scheduled to be consummated on September 19, 2015 and thus asked the Board for expedited action.[10] (ATDA Pet. for Declaratory Order 1; NSR Reply to ATDA Pet. for Declaratory Order 2.) The Board therefore reasonably acted on the pending requests to postpone the implementation of the transaction on September 18, 2015. Accordingly, Riffin's supplement will be rejected.

[9] As noted above, the Board addressed ATDA's filing in Decision No. 8. In that decision the Board denied ATDA's petition for declaratory order and declined to postpone the implementation of the transaction approved in Decision No. 6, which had become effective on June 15, 2015. To the extent ATDA's petition is relevant to the petitions for reconsideration addressed in this decision, ATDA's petition is already part of the record in this proceeding.

[10] The Board notes that NSR consummated the transaction on September 18, 2015.

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). See generally Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., FD 32760 (STB served Dec. 30, 2014). The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). If a party has presented no new evidence, changed circumstances, or material error that "would mandate a different result," then the Board will not grant reconsideration. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); CSX Transp.—Pet. for Declaratory Order, FD 35832, slip op. at 3 (STB served Feb. 29, 2016); Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 8-9 (STB served Nov. 8, 2012); Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

PPL Petition for Reconsideration. In Decision No. 6, the Board's approval was subject to a condition intended to preserve PPL's pre-transaction competitive options by providing continued potential access to D&H. Specifically, the Board imposed a condition that stated: "[c]ontingent upon PPL constructing a rail line to a point of connection with the D&H South Lines, the Board will grant trackage rights to D&H from that point of connection to Schenectady, N.Y." Decision No. 6 at 37. See also id. at 33-35. PPL alleges that the Board committed material error in drafting its build-out condition by (1) not making the condition self-executing upon the completion of PPL's connection to the D&H South Lines and (2) stating that the Board would grant the trackage rights to D&H, instead of allowing PPL to choose the carrier to receive the trackage rights. (PPL Pet. for Recons. 3, 6.) NSR and D&H opposed PPL's petition. (NSR Reply to Pets. for Recons. 3, D&H Reply to Pets. for Recons. 2-5.)

PPL is concerned that the language of the condition (stating that "the Board will grant" trackage rights upon completion of the PPL buildout rather than expressly ordering NSR to grant D&H trackage rights at that time) would require PPL to return to the Board once it has constructed a connection to the D&H South Lines and obtain a grant of trackage rights from NSR to D&H at that time. PPL argues that the condition instead should have been self-executing by allowing the trackage rights granted in Decision No. 6 to be exercised whenever PPL constructs a connection to the D&H Lines without any further Board approval. However, the Board's condition is self-executing: PPL will be entitled to use D&H's trackage rights (and NSR will be required to grant them) should PPL construct a connection to the D&H South Lines. The

Board stated that it "will grant" trackage rights to reflect that construction of the build-out was a future action. The language did not mean that further Board approval after the construction of a connection would be necessary.

PPL fails to support its argument that the Board committed material error by not granting PPL the right to decide which carrier would receive trackage rights from its point of connection with the D&H South Lines to Schenectady, N.Y. PPL is concerned that D&H's presence in the Northeast region is declining, and that it has "no assurances that D&H service through Schenectady or elsewhere will be available" in the future. (PPL Pet. for Recons. 6.) As a result, PPL argues, CSXT, not D&H, should be granted the build-out-contingent trackage rights, because CSXT "is a large and strong competitor of NS[R]'s with a positive and expansionist future, including in the Northeast," which provides PPL with greater business expansion opportunities in the future. (Id. at 6-8.)

But PPL's argument that it should be able to choose a carrier other than D&H for these trackage rights impermissibly seeks to improve PPL's pre-transaction competitive position. As the Board stated in Decision No. 6, "the Board's conditioning power is limited to preserving competitive options that may be foreclosed by a transaction, not increasing the competitive options for a specific carrier." Decision No. 6 at 35. Prior to the transaction approved in Decision No. 6, PPL did not have access to CSXT. PPL had access to NSR and the option to build out to D&H via the D&H South Lines. It was therefore appropriate for the Board to grant D&H the contingent trackage rights.

PPL argues that allowing it access to CSXT would in fact preserve, rather than improve, the competitive status quo, citing as support the Interstate Commerce Commission (ICC) decision in Burlington Northern Inc.—Control & Merger—Santa Fe Pacific Corp. (BN/SF Merger 1995), 10 I.C.C.2d 661 (1995). (PPL Pet. for Recons. 8.) In BN/SF Merger 1995, the ICC allowed Oklahoma Gas and Electric (OG&E) to choose one of three Class I railroads to receive build-out-contingent trackage rights. However, as a result of the transaction approved in BN/SF Merger 1995, OG&E would have lost access to both Burlington Northern Railroad Company (BN) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe), two independent carriers competing with each other. In that case, the ICC could not simply grant trackage rights to either BN or Santa Fe because the two entities were merging and would not continue to exist independently. Thus it was necessary to grant build-out-contingent trackage rights to a third carrier, and the ICC in that situation allowed OG&E to choose either the merged BNSF or a build-out to one of the three unaffiliated railroads operating near the shipper. In contrast, NSR and D&H are not merging and will continue to exist independently of one another. Accordingly, the Board properly found in Decision No. 6 that PPL was not entitled to a build-out condition that would give it access to either CSXT or D&H. [11]

[11] See also BN/SF Merger 1995, 10 I.C.C.2d at 745 ("the conditioning power is used to *preserve* competitive options (not to *expand* them) . . .") (emphasis in original); Canadian Nat'l (continued . . .)

For the foregoing reasons, PPL's petition for reconsideration will be denied.

SMART/TD-NY Petition for Reconsideration. In its petition for reconsideration, SMART/TD-NY makes multiple arguments claiming that the Board committed material error in Decision No. 6,[12] all relating to whether the Board applied the appropriate labor protective conditions. SMART/TD-NY also claims that there is new evidence demonstrating that D&H should have been considered an applicant and that it was material error for the Board not apply labor conditions based on this fact.

First, SMART/TD-NY alleges that the Board failed to properly analyze the employee impacts of the transaction with respect to both NSR and D&H employees. (SMART/TD-NY Pet. for Recons. 3-6, 13-18.) However, NSR provided the labor impact information for its employees as required by 49 C.F.R. § 1180.6(a)(2)(V), and the Board's decision made the necessary findings and conclusions based on that labor impact information in deciding to impose the labor protection conditions contained in New York Dock, as modified by Wilmington Terminal. See Decision No. 6 at 28-30. As discussed further below, SMART/TD-NY has not supported its claim that D&H is an applicant in this line sale proceeding.[13] Thus, no analysis of the impact of this transaction on D&H's employees was necessary.

Second, SMART/TD-NY argues that Decision No. 6 contained material error because the Board imposed the labor protection conditions contained in New York Dock, as modified by

(. . . continued)
Ry.—Control—Ill. Cent. Corp. (CN/IC), FD 33556, slip op. at 20 (STB served May 25, 1999) ("[i]n assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers."). In Major Rail Consolidation Procedures, 5 S.T.B. 1, 8-11 (2000), 5 S.T.B. 539, 545 (2001), the Board adopted a more searching regulatory review for major mergers. That policy does not apply to minor transactions such as this one. See Decision No. 6 at 17 n.55 & 23 n.66. In addition, the Board notes that if D&H was sold or transferred prior to PPL's construction of a build out to the D&H South Lines, the contingent trackage rights granted in Decision No. 6 would transfer to whichever carrier purchased or operated D&H.

[12] In Decision No. 6, the Board denied a petition for reconsideration filed by SMART/TD-NY of the Board's decision in this docket accepting NSR's application (Decision No. 1).

[13] All the cases cited by SMART/TD-NY involve mergers and consolidations where both parties to the transaction are required to be applicants and provide the necessary information. Here, however, NSR was the only party that needed authority from the Board and the only party that needed to provide information relevant to that request for authority. See Decision No. 6 at 5.

Wilmington Terminal, rather than New York Dock without modification.[14] (SMART/TD-NY Pet. for Recons. 6-7.) According to SMART/TD-NY, the Wilmington Terminal modification does not apply because that decision stated that "[u]nless otherwise provided by contract, the buyer's only obligation to the seller's employees will be to inform them of any availability of, and the terms and conditions of, employment." Wilmington Terminal, 6 I.C.C.2d at 815 (emphasis added). SMART/TD-NY argues that, because the purchase agreement between NSR and D&H provides that NSR "will make job offers" to 150 D&H employees who may be affected by this transaction, the parties do in fact have "a contract [that] mandates the buyer hire seller employees." As a result, SMART/TD-NY contends that the transaction is a consolidation, Wilmington Terminal is inapplicable, and the labor protective conditions in New York Dock alone should apply here. (SMART/TD-NY Pet. for Recons. 9-10.)

As discussed in Decision No. 6, the labor conditions contained New York Dock, as modified by Wilmington Terminal, were properly imposed here because this proceeding involves a line sale, not a consolidation, because D&H will continue to exist as a common carrier separate from NSR. See Decision No. 6 at 28-29, 35-36. See also Decision No. 7 at 3 (clarifying that the Board intended to impose the requirements of New York Dock, as modified by Wilmington Terminal, without any qualification or alteration). SMART/TD-NY's claim that NSR has contracted itself out from the Wilmington Terminal modifications to the New York Dock labor conditions lacks merit. The purchase agreement between NSR and D&H does contain a clause stating that the "[b]uyer may offer employment effective on the Closing Date, to all On-Line Employees. . . ." (NSR Appl. Vol. II at 42.) However, the plain language of the clause indicates that any offer of employment by NSR is permissive: NSR may offer employment to D&H employees on the D&H South Lines, but is not required to do so. Thus, with respect to the Wilmington Terminal language relied on by SMART/TD-NY, mandatory employment by NSR of D&H employees is not "otherwise provided by contract." Wilmington Terminal, 6 I.C.C.2d at 815. Furthermore, Wilmington Terminal does not indicate that it ceases to apply if the parties to a line sale agreement themselves enter into a contract providing employment or other umbrella agreement-like benefits for the seller's employees. See id. ("Although we have required umbrella agreements in most § [11323] merger transactions, we will not require them in line sales under § [11323]. We note, however, that the seller and buyer are free to negotiate on whether to provide for such an 'umbrella agreement.'").

[14] SMART/TD-NY also alleges that the Board improperly modified the requirements of Wilmington Terminal to no longer require pre-consummation negotiation of the required employee agreements, because Decision No. 6 contained the statement that ". . . the negotiation of the respective employee agreements cannot delay the consummation of a line sale transaction." (SMART/TD-NY Pet. for Recons. 7-8 (quoting Decision No. 6 at 29).) The Board clarified in Decision No. 7 that it intended to impose the requirements of New York Dock, as modified by Wilmington Terminal, without any qualification or alteration. (See Decision No. 7 at 3.)

Third, SMART/TD-NY argues that the labor protection conditions contained in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979), rather than Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc., 354 I.C.C. 605 (1978), as modified in Mendocino Coast Railway—Lease & Operate—California Western Railroad, 360 I.C.C. 653 (1980) (N&W/Mendocino), should apply to the two notices of exemption to modify trackage rights agreements,[15] which were embraced with the line sale transaction in this proceeding. See Decision No. 6 at 1 n.1. SMART/TD-NY argues that the Board has authorized NSR to discontinue segments of these trackage rights without the imposition of Oregon Short Line, and that NSR's operation of the line as an owner may be different than its operation of the line under trackage rights. (SMART/TD-NY Pet. for Recons. at 10, 12.) SMART/TD-NY also argues that longstanding Board practice has been "not to embrace ancillary line acquisitions, abandonments, trackage rights, and other coordinations which are part of a line sale, merger, or control transaction, into the overall New York Dock employee conditions." (SMART/TD-NY Pet. for Recons. at 12.) Here, SMART/TD-NY appears to refer to the Board's statement in Decision No. 6 that "any NSR employee potentially affected by NSR's change from 'tenant carrier operator to owner carrier operator' would also be affected by the line sale itself. Those employees would therefore be protected by the employee protection conditions contained in New York Dock as modified by Wilmington Terminal. Thus the imposition of Oregon Short Line protective conditions is unnecessary." Decision No. 6 at 29-30.

SMART/TD-NY fails to show that Oregon Short Line is applicable to the two notices of exemption to modify trackage rights agreements. As the Board previously explained in Decision No. 6, the labor protective conditions contained in Oregon Short Line apply to situations in which a carrier is exiting the market. See Decision No. 6 at 29; Oregon Short Line, 360 I.C.C. at 98 (describing "[l]abor protective conditions to be imposed in railroad abandonment or discontinuance pursuant to 49 U.S.C. 10903. . . ."). That is not what is occurring here. By modifying the trackage rights agreements in Norfolk Southern Railway, Docket No. FD 34209 (Sub-No. 1), and Norfolk Southern Railway, Docket No. FD 34562 (Sub-No. 1), NSR is not discontinuing or abandoning any service or lines; instead, its interest in the line is merely converting from tenant to owner. Although NSR's operations over the D&H South Lines might change as a result, NSR will still operate over the D&H South Lines and will not exit the market. The Oregon Short Line labor protective conditions are therefore inapplicable. Instead, the appropriate labor protective conditions here with regard to the trackage rights proceedings are those contained in N&W/Mendocino, which apply to trackage rights. Though SMART/TD-NY cites several cases in reference to its argument that Oregon Short Line should apply here, the cases cited actually support the Board's imposition of N&W/Mendocino to the trackage rights

[15] Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34209 (Sub-No. 1), and Norfolk Southern Railway—Trackage Rights Exemption—Delaware & Hudson Railway, FD 34562 (Sub-No. 1).

agreements, as well as the Board's statement that employees affected by the change in NSR's rights over these segments of the D&H South Lines would also be protected under New York Dock, as modified by Wilmington Terminal. See CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., 3 S.T.B. 196, 216 n.35, 372 n.259, 395 n.269 (1998) (applying Oregon Short Line conditions to discontinuances and N&W/Mendocino conditions to trackage rights and stating that "affected employees of applicants and their rail carrier affiliates covered by the Mendocino Coast, Norfolk and Western and/or Oregon Short Line conditions will also be covered by, and will therefore be entitled to the protections of, the New York Dock conditions."); Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233, 248 n.17, 522-24, 453-54, 527-28 (1996) (applying Oregon Short Line conditions to abandonments and discontinuances and N&W/Mendocino conditions to trackage rights); BN/SF Merger 1995, 10 I.C.C.2d at 797 (applying N&W/Mendocino conditions to trackage rights); Norfolk S. Corp.—Control—Norfolk & W. Ry, 366 I.C.C. 173, 231 n.80 (1982) ("The Oregon Short Line and NW-Mendocino conditions are similar to the New York Dock conditions, but are applied in the context of abandonment or trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, since all affected employees will also be covered by the New York Dock conditions imposed on the primary transaction.").

Fourth, SMART/TD-NY argues that it was material error for the Board not to consider D&H an applicant or to require employee impact information under 49 C.F.R. § 1180.6(a)(2)(v) from D&H. (SMART/TD-NY Pet. for Recons. 4-6, 13-18.) In Decision No. 6, the Board rejected SMART/TD-NY's claims in its first petition for reconsideration that D&H should have been viewed as an applicant here, explaining that:

> The Board's assessment of which entities are applicants in a transaction is based on the applicable statutes and regulations. Under 49 C.F.R. § 1180.3(a), "[t]he term applicant means the parties initiating a transaction . . . ." NSR is the party that initiated the transactions underlying these proceedings. Moreover, as the party seeking to "purchase . . . property of another rail carrier" and to modify existing trackage rights over another rail carrier's line, NSR is the party that must obtain "the approval and authorization of the Board" in order to carry out the proposed transaction under the statute. 49 U.S.C. § 11323(a)(2) & (a)(6).

Decision No. 6 at 5. Here, SMART/TD-NY presents what it views as new evidence that D&H is an applicant in this proceeding. SMART/TD-NY contends that the definition of "applicant" in 49 C.F.R. § 1180.3 uses the term "parties," which would include NSR and D&H. SMART/TD-NY also claims that the Board was inconsistent in Decision No. 6 when it found only NSR to be an applicant, but then used the plural when referring to "applicants" and "their representations" in its ordering paragraphs. (SMART/TD-NY Pet. for Recons. 15-16.)[16]

[16] In its petition, SMART/TD-NY also alleges that D&H has considered itself an applicant, referring to a December 24, 2014 letter filed by D&H. (SMART/TD-NY Pet. for (continued . . .)

The fact that 49 C.F.R. § 1180.3 uses the plural "parties" when defining the term "applicant" as "the parties initiating a transaction" does not demonstrate that both NSR and D&H must be considered applicants. That rule is directed at mergers and consolidations among various rail carriers, where both parties to a transaction will need "the approval and authorization of the Board" under 49 U.S.C. § 11323(a), as well as to line sales where only one party needs § 11323 authority. Thus, use of the word "parties" in the rule does not mean that all transactions under 49 U.S.C. § 11323 have, or are required to have, multiple applicants. In addition, the Board's allegedly "inconsistent position" in Decision No. 6 finding NSR the sole applicant, but then referring to NSR as "applicants" and to "their application," Decision No. 6 at 37 ¶8, is not new evidence that requires reconsideration of the Board's earlier finding that NSR is the sole applicant. In Decision No. 6 the Board expressly found NSR to be the sole applicant. Decision No. 6 at 5. Board typographical errors do not show that the Board intended to find that D&H was in fact an applicant to this proceeding.[17] To remove any future confusion that NSR is the sole applicant in this proceeding, we will revise Decision No. 6 to correct the typographical errors in ordering paragraph number 8 by serving the parties with a copy of the corrected decision and placing a copy of the corrected decision on the Board's website.

SMART/TD-NY also argues that if D&H is not an applicant, Board policy does not require any labor protective conditions for D&H employees, noting that "[t]he Board's policy is not to give protective conditions for non-applicant employees in consolidation transactions." (Id. at 16-17.) However, SMART/TD-NY's interpretation of agency precedent is incorrect. The Wilmington Terminal modification of the New York Dock labor conditions actually requires both buyer and seller to take actions with respect to their own employees. See, e.g., Wilmington Terminal, 6 I.C.C.2d at 814-15. SMART/TD-NY also cites to CSX Corp. as support for its argument that the Board normally does not provide employee protective conditions for non-applicant employees in consolidation transactions. In that case, the Board denied a labor union's request to impose labor protective conditions on a carrier that interchanged with the two carriers that were parties to the transaction. CSX Corp., 3 S.T.B. at 332. The Board found that "the employees of a nonapplicant carrier, or a carrier not directly involved in a transaction governed by 49 U.S.C. § 11323, are not entitled to labor protection under 49 U.S.C. § 11326." Id.

(. . . continued)
Recons. 15.) The Board already rejected this argument in Decision No. 6 (slip op. at. 5-6) ("D&H's December 24 letter describing itself as an 'applicant' does not constitute new evidence (even assuming that D&H had not filed its subsequent January 7, 2015 letter correcting its earlier statement and noting that 'NS[R] is the "applicant" in this proceeding, not D&H')."").

[17] Although the Board referred to "applicants" and "their application" in the ordering paragraph, the Board specified that this directive applied solely to NSR in the body of the decision: "[T]he Board will require NSR to implement the Transitional Divisions and Routing Agreement and Direct Short Line Access Agreement as a condition of our approval of the acquisition transaction." Decision No. 6 at 19.

(emphasis added.) Unlike the carrier in that case, D&H clearly is a carrier directly involved in this transaction.

Finally, SMART/TD-NY argues that the Board committed material error in excluding from the Decision No. 6 findings the impact of D&H Discontinuances on this proceeding. (SMART/TD-NY Pet. for Recons. at 18-19.) In fact, however, Decision No. 6 shows that the Board's competitive analysis did take those discontinuances into account. See Decision No. 6 at 14 (finding that the transaction is not likely to have anticompetitive effects "even when taking into account D&H's planned discontinuances of trackage rights that connect to the D&H South Lines, . . . which are mentioned in NSR's application"), 16 ("because these discontinuances involve only trackage rights that . . . could be discontinued independent of this transaction, they do not cast doubt on the Board's finding that the proposed acquisition transaction will have no likely and substantial anticompetitive effects that cannot be ameliorated by the imposition of conditions").

For the foregoing reasons, SMART/TD-NY's petition for reconsideration is denied.

CNJ Petition for Reconsideration. In its petition for reconsideration, CNJ makes claims of material error and substantially changed circumstances. The majority of CNJ's arguments relate to the D&H Discontinuances proceeding, which CNJ views as inextricably linked to this one. NSR argues in response that CNJ's petition should be denied because it raises no new issues, NSR was not required to include the D&H Discontinuances in its application, and if the Board were to reject or deny the D&H Discontinuances, it would not create a joint use agreement. (NSR Reply to Pets. for Recons. 16-22.) D&H separately argues that CNJ's petition should be denied. (D&H Reply to Pets. for Recons. 5-8.)

First, CNJ alleges as substantially changed circumstances that the scope of D&H Discontinuances is "far greater than what NS[R] led everyone to believe," stating that it has discovered abandonment proceedings allegedly related to the D&H Discontinuances, and therefore this proceeding, which were "undisclosed." (CNJ Pet. for Recons. 4, 8.) The proceedings referenced by CNJ include R.J. Corman Railroad, Docket No. AB 550 (Sub-No. 3X) and several abandonment and discontinuance proceedings from the early 1980s. CNJ describes these as "proceedings which either: dealt with the D&H's trackage rights, or dealt with lines encumbered by D&H's trackage rights." (CNJ Pet. for Recons. 8.) CNJ raises concerns that these proceedings may result in stranded segments, or may be "illegal" abandonments. (Id. at 10.) It argues that, because the details of the scope of the D&H Discontinuances and the details of these "related" proceedings were not included in NSR's application, the application was incomplete.

The Board, however, has repeatedly rejected the argument that the D&H Discontinuances should have been embraced into this proceeding, because the authority for those discontinuances exists independently from the transaction here. See Decision No. 6, slip op. at 15-16; D&H Discontinuances, AB 167 (Sub-No. 27X), slip op. at 3 (STB served July 10, 2015). CNJ fails to

demonstrate that the Board should revisit that issue. CNJ's arguments about the scope of the discontinuances in D&H Discontinuances and the other abandonment or discontinuance proceedings CNJ believes may be related to D&H Discontinuances are not appropriately raised here. Indeed, these issues were also raised by CNJ in its petition to revoke in D&H Discontinuances, and the Board has addressed them in that proceeding in its decision issued on October 18, 2016.

Second, CNJ raises concerns that "the Board's adjudication of this proceeding[] may or may not give rise to . . . jurisdictional challenges," by which it appears to mean issues that may fall within the jurisdiction of the Special Court,[18] the United States Rail Agency (USRA),[19] and the United States Bankruptcy Court that oversaw D&H's bankruptcy proceeding in the late 1980s and early 1990s. (CNJ Pet. for Recons. 12.) However, CNJ has presented no evidence that any of the potential jurisdictional limitations it raises actually involve this case. Indeed, CNJ itself appears to recognize that the jurisdictional issues it raises could only affect D&H Discontinuances. CNJ states, with regard to its Special Court jurisdiction argument, that "it is virtually guaranteed that there will be issues which arise in the D&H proceeding, which will unquestionably touch upon the Special Court's exclusive jurisdiction" and that "there appear[] to be no immediately apparent issues which give rise to questions which would invoke the jurisdiction of the Special Court in this proceeding." (CNJ Pet. for Recons. 14 (emphasis added).) With regard to its USRA and NERSA claims, CNJ states that "NERSA set forth a series of unique events that, while not directly impacting this proceeding, will cast more fuel on the metaphorical 'fire' which the D&H proceeding is rapidly becoming." (Id. at 15 (emphasis added).) Finally, with regard to its bankruptcy court argument, CNJ also admits that this issue is related to D&H Discontinuances. It makes no argument as to its relevance here other than to state that "[t]o the extent that an issue might affect this proceeding, CNJ reserves the right [to] challenge the jurisdiction of this Board to address issues which are within the exclusive jurisdiction of the Bankruptcy Court." (Id. at 16.) Because these arguments all relate to D&H Discontinuances and CNJ has not demonstrated their relevance here, we will not address these arguments in this decision. However, CNJ raised similar arguments in its petition to revoke in

[18] The Special Court was a three-judge judicial panel established in 1974 to oversee "all judicial proceedings with respect to the final system plan [FSP]." 45 U.S.C. § 719(b)(1). The FSP identified the rail properties to be conveyed to Consolidated Rail Corporation (Conrail) after Conrail was created following the bankruptcy of Penn Central Transportation Company and seven other northeastern railroads in 1970. The Special Court was abolished in 1996 and the jurisdiction of the Special Court was transferred to the United States District Court for the District of Columbia. Id. § 719(b)(2).

[19] The USRA oversaw the creation of Conrail, and was abolished in 1987. Its remaining duties were transferred to the Secretary of Transportation. 45 U.S.C. § 1341(a)(2). CNJ appears to argue that there may be some conflict between the Board's jurisdiction and the jurisdiction of USRA to adjudicate questions related to transactions conducted under the Northeast Rail Service Act of 1981 (NERSA). (CNJ Pet. for Recons. 15-16.)

D&H Discontinuances and the Board addressed them in its decision served on October 18, 2016 in that proceeding.

Finally, CNJ argues that the Board committed material error in Decision No. 6 by failing to find a "nexus" between the transaction in this proceeding and the D&H Discontinuances. CNJ argues that, because the Board's May 13, 2015 decision in D&H Discontinuances stayed that proceeding pending the filing of supplemental information and issuance of a further order from the Board, when the Board issued Decision No. 6 there was "no longer any legally effective discontinuance authority upon which the Board appears to have relied. . . ." (CNJ Pet. for Recons. 17.) According to CNJ, the May 13, 2015, decision made clear that NSR could not consummate the transaction in this docket without the consummation of the D&H Discontinuances. CNJ argues that if D&H is forced to retain its trackage rights, NSR's voluntary haulage agreement with D&H for the benefit of connecting short lines carriers, including Lehigh Valley Rail Management (LVRM), would create a "joint use agreement" requiring Board approval because both D&H and NSR would have the right to provide service to LVRM. (Id. at 22-24.) CNJ claims that it was material error for the Board not to address this issue in Decision No. 6. (Id. at 25.)

The Board rejects CNJ's arguments as moot. On July 2, 2015, a corrected verified notice of exemption was published in D&H Discontinuances, the effective date of which was August 4, 2015. In decisions issued on July 10, 2015, and August 13, 2015, the Board denied petitions for stay filed by SMART/TD-NY and Riffin, respectively. D&H Discontinuances, AB 167 (Sub-No. 27X) (STB served July 10, 2015); D&H Discontinuances, AB 167 (Sub-No. 27X) (STB served Aug. 13, 2015). On September 22, 2015, D&H notified the Board that on September 18, 2015, it consummated the D&H Discontinuances transaction. Also on September 18, 2015, NSR notified the Board that on that date it consummated the transaction at issue in this proceeding. In a decision served on October 18, 2016, the Board denied the petitions to revoke in D&H Discontinuances. In this decision the Board is denying the petitions for reconsideration of Decision No. 6. Both proceedings have been consummated, and therefore CNJ's argument that the consummation of this transaction without the consummation of D&H Discontinuances creates a joint use issue is moot.[20]

For the foregoing reasons, CNJ's petition for reconsideration will be denied.

[20] Because the joint use argument is moot, the Board makes no finding as to the argument's merits. However, even if the argument were not moot, the Board does not operate in such a way that a carrier could accidentally be given or acquire any authority otherwise requiring Board approval, nor could the Board's approval of one type of authority be transformed into another type of authority because of the actions of a carrier.

It is ordered:

1. Riffin's May 15, 2015, filing is accepted into the record.

2. Strohmeyer's May 15, 2015, filing is accepted into the record.

3. Riffin's June 24, 2015, reply is rejected.

4. Riffin's requests for reconsideration of Decision No. 6 and Decision No. 7, and request for stay of Decision No. 6 contained in his June 24, 2015 reply to the petitions for reconsideration are denied.

5. SMART/TD-NY's July 6, 2015, motion to strike is denied.

6. CNJ's August 14, 2015 filing is rejected.

7. Riffin's first September 4, 2015 motion to supplement the record is denied.

8. Riffin's second September 4, 2015 motion to supplement the record is denied.

9. Riffin's October 5, 2015 supplement to the record is rejected.

10. PPL's petition for reconsideration is denied.

11. SMART/TD-NY's petition for reconsideration is denied.

12. CNJ's petition for reconsideration is denied.

13. Any motion, petition, or request not specifically approved in this decision is denied.

14. Ordering paragraph 8 of Decision No. 6 will be revised to read as follows: "Applicant must adhere to its representation that it will implement the two voluntary commercial agreements discussed in its application, the Transitional Divisions and Routing Agreement and the Direct Short Line Access Agreement."

15. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.